

Before the
Federal Communications Commission
Washington, D.C. 20554

AUG 15 2005

In the Matter of)
)
Petition for Waiver of Section 64.402) WT Docket No. 05-212
of the Commission's Rules)

MEMORANDUM OPINION AND ORDER

Adopted: August 11, 2005

Released: August 11, 2005

By the Acting Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we grant Verizon Wireless's petition for waiver¹ of the Commission's priority access service (PAS) Rules.² Specifically, we grant Verizon Wireless a waiver to provide one priority level instead of the required five priority levels until the occurrence of one of the following events, whichever is earliest: (1) we receive notification by Verizon Wireless or the National Communications System (NCS),³ that Verizon Wireless can deploy five priority levels; (2) expiration or termination of the contract between Verizon Wireless and the NCS, the Computer Science Corporation (CSC), or any other service integrator acting on behalf of the NCS, to provide wireless priority access capability; or (3) June 30, 2007.⁴ Additionally, we find that Verizon Wireless's Phase I PAS does not, by itself, render Verizon Wireless liable under Section 202(a) of the Communications Act, as amended,⁵ for unjust or unreasonable discrimination.

¹ Petition for Waiver of Section 64.402 of the Commission's Rules filed by Verizon Wireless (filed May 13, 2005) (Petition).

² See 47 C.F.R. Part 64, Appendix B; see also *The Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State, and Local Public Safety Agency Communication Through the Year 2010, Second Report and Order*, WT Docket 96-86, 15 FCC Rcd 16720, 16722 ¶ 5 (2000) (*PAS R&O*).

³ The NCS is an interagency organization established by Executive Order to administer and manage the telecommunications assets of twenty-three federal government organizations to address national security and emergency preparedness (NSEP) telecommunications related issues. *Id.* at 1 citing Executive Order No. 12,472, Assignment of National Security and Emergency Preparedness Telecommunications Functions, 49 Fed. Reg. 13471 (1984). We refer to the role or duties of the NCS, rather than that of the Department of Homeland Security (DHS), because the NCS implements and administers the Wireless Priority Service (WPS). See Statement in Support of Petition for Waiver filed by U.S. Department of Homeland Security Executive Agent of the NCS at 2 (filed June 13, 2005) (NCS Statement). WPS is the programmatic name applied to PAS as it is administered by the NCS. NCS Statement at 2 n.5.

⁴ We note that Verizon Wireless may seek an extension of this limited and temporary waiver if delays arise in its deployment of Phase II PAS. See para. 12 *infra*.

⁵ See 47 U.S.C. § 202(a).

II. BACKGROUND

A. PAS Rules

2. As requested by the NCS, in 2000, the Commission adopted rules authorizing Commercial Mobile Radio Service (CMRS) carriers to offer PAS to NSEP users.⁶ The PAS Rules allow authorized NSEP users to gain access to the next available open channel before CMRS subscribers who are not engaged in NSEP functions when wireless spectrum is congested during emergencies.⁷ Priority calls do not preempt calls in progress,⁸ nor does PAS guarantee the completion of the priority call.⁹ As envisioned by the Commission's Part 64 Rules, an NSEP user may activate PAS on a per call basis by dialing a feature code¹⁰ before dialing the pertinent phone number.

3. The PAS Rules do not require CMRS providers to offer PAS or to adhere to particular technical standards in implementing PAS,¹¹ however, CMRS carriers who elect to offer PAS must adhere to uniform operating protocols,¹² such as the number of priority levels and the priority level for particular NSEP users. In particular, the Commission concluded that PAS would include five priority levels, with non-government NSEP personnel receiving entitlement to a priority level as appropriate;¹³ and the NCS would have responsibility for the day-to-day administration of PAS, with oversight responsibilities residing with the Commission.

4. The PAS Rules also provide that the Executive Office of the President, acting through the NCS,¹⁴ will administer PAS. The role of the FCC is limited to regulatory oversight for implementation

⁶ *PAS R&O*, 15 FCC Rcd 16720.

⁷ *PAS R&O*, 15 FCC Rcd at 16721 ¶ 3.

⁸ See 47 C.F.R. Part 64, Appendix B, § 2c.

⁹ *PAS R&O*, 15 FCC Rcd at 16722 ¶ 5.

¹⁰ See 47 C.F.R. Part 64, Appendix B, § 2c.

¹¹ *PAS R&O*, 15 FCC Rcd at 16722 ¶ 4, 16729 ¶ 17.

¹² *PAS R&O*, 15 FCC Rcd at 16722 ¶ 4. The Commission determined that uniform operating protocols would: (a) ensure the compatibility of a peacetime PAS system with a wartime system, (b) allow federal and out-of-region NSEP personnel to avail themselves of PAS, and (c) enable a PAS system to be far more effective. *Id.*

¹³ The priority levels for NSEP leadership are; 1) Executive Leadership and Policy Makers, 2) Disaster Response/Military Command and Control, 3) Public Health, Safety, and Law Enforcement Command, 4) Public Services/Utilities and Public Welfare, and 5) Disaster Recovery. See 47 C.F.R. Part 64, Appendix B, § 5.

¹⁴ The NCS receives, processes, and evaluates requests for priority action from authorizing agents. See 47 C.F.R. Part 64, Appendix B, § 2d.1. Further, the NCS assigns priorities or denies requests for priority and conveys its determinations to the service provider and the authorizing agent. The NCS makes any revisions to, or revocations of, priority assignments. Similarly, the NCS is responsible for issuing new or revised regulations or procedures regarding the operation, administration and use of PAS and for providing training on PAS to the affected entities and individuals. The NCS maintains a database for PAS related information and discloses the content of this database only to the extent required by law. Additionally, the NCS serves as the final arbiter of authority for the assignment of priorities and the adjudicator of any disputes that arise during the exercise of the President's wartime emergency powers under Section 706 of the Communications Act. See 47 U.S.C. § 706.

and enforcement of PAS Rules, and adjudication of disputes that arise regarding priority level when the President's wartime emergency powers have not been invoked.¹⁵ The purpose of the PAS Rules is to comply with our statutory mandate "to make available ... a rapid, efficient Nation-wide ... communication service ... for the purpose of national defense, [and] for the purpose of promoting safety of life and property...."¹⁶

B. Verizon Wireless Waiver Petition

5. Verizon Wireless is a CMRS carrier that operates its digital network using Code Division Multiple Access (CDMA) technology.¹⁷ Verizon Wireless provides service to 45.5 million customers and reaches 49 of the Top 50 U.S. markets.¹⁸ A significant number of Verizon Wireless's customers are federal, state, and local government users.¹⁹

6. While no carrier offers PAS using CDMA technology, currently three CMRS carriers (T-Mobile,²⁰ Cingular Wireless, and Nextel Communications) offer PAS through Global System for Mobile Communications (GSM) technology or Integrated Digital Enhanced Network (iDEN) technology.²¹ On May 13, 2005, Verizon Wireless submitted its petition seeking a waiver of the five-priority level requirement to enable it to provide its proposed wireless priority service to the NCS in the manner agreed to with the DHS.²² On June 17, 2005, we sought comment on Verizon Wireless's petition.²³ Although there were no comments filed in response to the public notice, both the NCS and the Department of Defense (DoD) filed supporting statements.²⁴

7. Although the PAS Rules require CMRS carriers to provide five priority levels for NSEP users, Verizon Wireless asserts that the network equipment and software it uses to provide CDMA wireless services is incapable of distinguishing among users in five different priority groups.²⁵ However,

¹⁵ See 47 C.F.R. Part 64, Appendix B, § 3a.

¹⁶ *PAS R&O*, 15 FCC Rcd at 16721 ¶ 1 n.1 citing 47 U.S.C. § 151.

¹⁷ See Petition at 4.

¹⁸ <http://www.verizonwireless.com/b2c/aboutUs/index>.

¹⁹ Petition at 5.

²⁰ Formerly VoiceStream Wireless Corporation.

²¹ See NCS Website at <http://wps.ncs.gov/>; see also Petition at 4. Specifically, T-Mobile and Cingular use the GSM interface, while Nextel uses iDEN technology.

²² Petition at 1.

²³ Wireless Telecommunications Bureau Seeks Comment on Verizon Wireless Petition for Waiver of Part 64 Priority Access Service Rule, *Public Notice*, 20 FCC Rcd 10662 (WTB 2005).

²⁴ See NCS Statement; Statement in Support of Petition for Waiver filed by the U.S. Department of Defense (DoD) (filed June 13, 2005) (DoD Statement). Prior to creation of DHS, the DoD served as Executive Agent for the NCS. *Id.*; see also Assignment of National Security and Emergency Preparedness Telecommunications Functions, 49 Fed. Reg. 13471 (1984).

²⁵ Petition at 2.

Verizon Wireless asserts that it can deploy a Part 64 compliant PAS system beginning in early 2007.²⁶ Verizon Wireless cites complexity of software and budgetary constraints as restricting its total compliance with Part 64 immediately.²⁷ Because of these technological and budgetary constraints, the NCS, CSC, equipment vendors, and Verizon Wireless agree that Verizon Wireless's CDMA PAS deployment should occur in two phases.²⁸ Furthermore, the parties have agreed on a PAS capability that will meet the NCS's needs for providing access to NSEP users.²⁹ In Phase I, Verizon Wireless will place all call attempts by priority users in the same queue awaiting the next available PAS channel.³⁰ Verizon Wireless reports that upon deployment of Phase II, it will have the ability to recognize the PAS priority level of each NSEP user in early 2007 and thus fully comply with our PAS requirements.³¹ However, concurrent with its deployment of Phase I, Verizon Wireless seeks a determination that the provision of its Phase I CDMA PAS to authorized NSEP users pursuant to contract with CSC, another service integrator under contract to the NCS or DHS, or otherwise approved by the NCS or DHS, is *prima facie* lawful under the Communications Act and does not constitute unreasonable discrimination or an unreasonable act or practice.³²

III. DISCUSSION

A. PAS Waiver

8. We may grant a waiver of the Commission's Rules if it is shown that the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or in view of the unique or unusual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest or the applicant has no reasonable alternative.³³ Based upon the circumstances presented in Verizon Wireless's petition, we find that a waiver permitting Verizon Wireless to offer one level of priority pending deployment of its Phase II PAS is consistent with the underlying purposes of the Commission's PAS Rules and serves the public interest. We therefore grant Verizon Wireless's petition for waiver as explained herein.

9. Although Verizon Wireless's Phase I PAS would have only one priority level, the DoD argues that granting the waiver would enhance PAS coverage, reduce prices and enhance services with the addition of a CMRS competitor.³⁴ Additionally, granting the waiver would allow at least some priority capability for eligible DoD NSEP users in organizations that have contracted for Verizon

²⁶ *Id.* at 3.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*; *see also* DoD Statement at 3 n.9.

³¹ Petition at 3.

³² *Id.*

³³ 47 C.F.R. § 1.925(b)(3).

³⁴ DoD Statement at 2.

Wireless service in a particular location.³⁵

10. In light of the NCS's responsibility to coordinate the planning for and provision of NSEP communications for the federal government, we continue to give great deference to the NCS with regard to its needs in this respect. The NCS has indicated that it has an ongoing need for wireless priority access in emergency situations. We do not doubt the NCS imperative and we recognize the important role of such communications in emergency situations, particularly after the events of September 11th. We further recognize that granting a waiver will promote our statutory mandate to make a rapid efficient Nationwide communications service for the purpose of national defense and promoting safety of life and property. Accordingly, we accept NCS's determination that Verizon Wireless providing CDMA PAS with one priority level with planned upgrades to five priority levels is more desirable than no CDMA PAS capability.³⁶

11. Based upon the totality of the circumstances presented, we find that requiring Verizon Wireless to provide five priority levels immediately is unduly burdensome and contrary to the public interest in light of the ongoing security concerns, and the NCS's objective of promoting PAS access to NSEP users during emergencies. We agree with the DoD that permitting the two phase implementation approach will substantially enhance access to a version of PAS for key emergency responders in the heavily populated northeastern portion of the United States.³⁷ We believe that having communication capability as described by Verizon Wireless serves the public interest for the near term. Moreover, we are cognizant of the benefits that will accrue to the government by adding another eligible CMRS provider in terms of coverage, lower prices, and technological enhancements. Consequently, we believe that a grant of Verizon Wireless's petition is warranted. We shall limit the duration of the waiver to the minimum time necessary for Verizon Wireless to deploy its Phase II PAS.

12. Because Verizon Wireless believes it can deploy its Phase II PAS by early 2007, we shall limit the waiver until the end of the second quarter of 2007 or June 30, 2007. Specifically, the waiver shall last until the occurrence of the following events, whichever is earliest: (1) we receive notification by Verizon Wireless or the NCS that Verizon Wireless can deploy five priority levels; (2) expiration or termination of the contract between Verizon Wireless and the NCS, the CSC, or any other service integrator acting on behalf of the NCS, to provide wireless priority access capability; or (3) June 30, 2007. Based upon Verizon Wireless's representations, we believe that these triggering events are sufficient to allow Verizon Wireless to deploy Phase II PAS in a timely manner. However, we recognize that unforeseen events may cause delays in the deployment schedule. In the event such delays occur, Verizon Wireless may file a request for an extension of this waiver relief in advance of the expiration date from the Wireless Telecommunications Bureau.

B. Liability Protection

13. Finally, we address Verizon Wireless's request for the same liability protection for its Phase

³⁵ *Id.* at 3.

³⁶ See NCS Statement at 4 ("...desirable to have some priority access service in place, even one that was not fully able to discriminate among various priority levels"); DoD Statement at 3-4 (a two-phased approach would substantially enhance access to a version of PAS for key emergency responders in the heavily populated northeastern portion of the United States, and would give initial PAS access to qualified users well in advance of the final, fully compliant version of Verizon Wireless's CDMA PAS access).³⁶

³⁷ See DoD Statement at 3.

I PAS as the Commission set forth in the *PAS R&O*.³⁸ Section 202(a) of the Communications Act prohibits common carriers from making any unjust or unreasonable discrimination in charges, practices, classifications, facilities or services, from giving an undue or unreasonable preference or advantage, or from subjecting any person, class of persons or locality to any undue or unreasonable prejudice or disadvantage.³⁹ The Commission held in the *PAS R&O* that providing priority access to authorized NSEP users in accordance with our PAS Rules would be prima facie lawful under the Communications Act and not unreasonable discrimination or an unreasonable preference.⁴⁰ Accordingly, the Commission held that any person filing a complaint would bear a heavy burden of proof to show that a provider's actions that are related to its PAS offering violate Section 202 of the Communications Act.⁴¹

14. Section 202 does not prevent carriers from treating users differently; it bars only unjust or unreasonable discrimination.⁴² Therefore, liability protection extends to all carriers that do not unjustly or unreasonably treat users differently. Differentiation among users is lawful so long as there is a valid reason for the differentiation.⁴³ In the case of PAS, in emergencies, non-NSEP customers simply are not "similarly situated" with NSEP personnel. NSEP personnel are attempting to save and protect lives and property, restore order, and restore critical services. The ability of NSEP personnel to communicate without delays during emergencies is essential. In a national emergency, the ability of federal personnel to access the wireless channels is imperative. A CMRS provider, therefore, does not violate the Communications Act by offering federal users the ability to achieve that access. In this case, Verizon Wireless may treat NSEP personnel differently from its other customers during its offering of Phase I PAS because there is a valid reason for doing so. Accordingly, Verizon Wireless and similarly situated carriers are entitled to the same liability protection set forth in paragraphs 22-24 of the *PAS R&O* for purposes of providing immediate, short-term priority access to NSEP personnel. We stress that this liability protection extends only to Section 202(a) and not to any other rule or law. Further, this *Memorandum Opinion and Order* is not evidence of compliance with any other obligation and should not be seen as indicating any general protection from liability under any other legal theory.

IV. CONCLUSION

15. Verizon Wireless indicates that it is on schedule to full compliance with our PAS Rules and expects to be fully compliant by early 2007. In addition to providing for immediate availability of some form of CDMA PAS, we seek to promote and facilitate implementation of uniform PAS systems as described in our Rules and as originally conceived by the NCS. Consequently, we conclude that grant of Verizon Wireless's petition is in the public interest and therefore grant Verizon Wireless a limited and

³⁸ Petition at 4.

³⁹ 47 U.S.C. § 202(a).

⁴⁰ *PAS R&O*, 15 FCC Rcd at 16730-31 ¶ 23.

⁴¹ *Id.*

⁴² *Id.*; see VoiceStream Wireless Corporation Petition for Waiver of Section 64.402 of the Commission's Rules, *Memorandum Opinion and Order*, 17 FCC Rcd 6134, 6141 ¶ 19 (2002); see also Investigation of Special Access Tariffs of Local Exchange Carriers, *Tentative Decision*, CC Docket. No. 85-166, 8 FCC Rcd 1059, 1079 ¶ 135 (1993); MTS and WATS Market Structure, *Third Report and Order*, CC Docket. No. 78-72, 93 F.C.C. 2d 241, 271 ¶ 97 (1983).

⁴³ See *PAS R&O*, 15 FCC Rcd at 16730-31 ¶ 23.

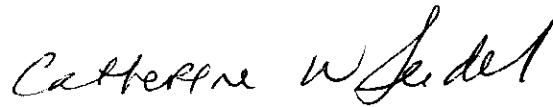
temporary waiver of the PAS priority level requirement until the occurrence of the following events, whichever is earliest: (1) we receive notification by Verizon Wireless or the NCS that Verizon Wireless can deploy five priority levels; (2) expiration or termination of the contract between Verizon Wireless and the NCS, the CSC, or any other service integrator acting on behalf of the NCS, to provide wireless priority access capability; or (3) June 30, 2007.⁴⁴

V. ORDERING CLAUSES

16. Accordingly, pursuant to Sections 1 and 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), and Section 1.925 of the Commission's Rules, 47 C.F.R. § 1.925, IT IS ORDERED that the Petition for Waiver of Section 64.402 of the Commission's Rules filed by Verizon Wireless on May 13, 2005 IS GRANTED to the extent provided herein.

17. This action is taken under delegated authority pursuant to Section 5(c) of the Communications Act, as amended, 47 U.S.C. § 155(c) and Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. § 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION



Catherine W. Seidel
Acting Chief, Wireless Telecommunications Bureau

⁴⁴ As noted above, Verizon Wireless may seek an extension of this limited and temporary waiver if delays arise in its deployment of Phase II PAS. *See* para. 12 *supra*.